Duta Wajar Sdn Bhd v Pasukhas Construction Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1100 OF 2010
MOHD HISHAMUDIN, JEFFREY TAN AND LINTON ALBERT JJCA
3 FEBRUARY 2012

Arbitration — Stay of proceedings — Grant of stay of proceedings — Whether there was arbitration agreement that would allow stay of proceedings — Whether appellant signed arbitration agreement when there was no exchange of communication between parties

The respondents were awarded a construction project in Cherating, Pahang by MTM Millennium Holdings Sdn Bhd. The appellant was then invited by the respondents to tender their quotation for piling works at the project site. While the respondents alleged that the subcontract was entered by both parties, the appellant argued otherwise. The dispute arose when the appellant had completed works and when three progress claims amounting to RM1,433,500.10 were made but the respondents failed to make any payment. The appellant proceeded to file a suit against the respondents for the said sum. By way of summons in chambers, the respondents applied to stay all proceedings in the action by virtue of s 10 of the Arbitration Act 2005. Based on the finding that the respondents had not signed the documents containing the alleged agreement relied upon by the appellant, the application was dismissed by the learned senior assistant registrar. It was concluded that the appellant had never agreed to submit the dispute in question to arbitration. On appeal to the judge in chambers, the decision of the learned senior assistant registrar was reversed. The judge found that there was a subcontract agreement between the parties and that there was an acceptance in the subcontract agreement under cl 10, to refer the dispute to arbitration even though the appellant did not sign the subcontract agreement. This finding was based on the 'conduct of the appellant in bidding for and proceeding with the works' and that signing was a mere formality. Aggrieved by the decision of the learned judge, the appellant appealed to the Court of Appeal.

Held, allowing the appeal with costs:

(1) There was no arbitration agreement in writing between the parties. If there was no arbitration agreement, the question of stay of proceedings pending arbitration under s 10 of the Act did not arise. However, there was a contractual relationship between the parties. Therefore, the respondents cannot later impose another agreement on the appellant said

to be a formally written subcontract unless the appellant agreed to be bound by the latter written agreement, of which the appellant refused and declined (see paras 20–21 & 23).

(2) The court was unable to accept the respondents' argument that the appellant had received but failed to sign the proposed subcontract agreement yet carried on to complete the works. The legal burden to prove such claims on a balance of probabilities was on the respondents. Based on the evidence, the legal burden had not been discharged by the respondents when they made their application. The appellant had neither signed nor responded to the draft subcontract agreement sent by the respondents. There was no exchange of letters or faxes or other means of communication between the parties that provided a record of a written arbitration agreement. The letters referred by the respondents' counsel were irrelevant and insufficient to prove on a balance of probabilities the exchanges of letters that provided a record of a written arbitration agreement. The standard of proof had not been met (see paras 24–25 & 30).

[Bahasa Malaysia summary

Responden-responden diawardkan dengan projek pembinaan di Cherating, Pahang oleh MTM Millennium Holdings Sdn Bhd. Perayu kemudiannya dijemput oleh responden-responden untuk menender sebut harga mereka bagi kerja-kerja cerucuk di kawasan projek tersebut. Responden-responden mendakwa bahawa subkontrak dimasuki oleh kedua-dua pihak, perayu menghujah sebaliknya. Pertikaian berbangkit apabila perayu telah menyiapkan kerja-kerja dan apabila tiga tuntutan kemajuan berjumlah RM1,433,500.10 dibuat tetapi responden-responden gagal untuk membuat apa-apa bayaran. Perayu meneruskan untuk memfailkan tindakan terhadap responden-responden untuk jumlah tersebut. Melalui saman dalam kamar, responden-responden memohon untuk menangguhkan kesemua prosiding dalam tindakan mengikut s 10 Akta Timbang Tara 2005. Berdasarkan dapatan bahawa responden-responden tidak menandatangani dokumen-dokumen yang mengandungi perjanjian tersebut yang digunakan oleh perayu, permohonan ditolak oleh timbalan pendaftar kanan yang bijaksana. Ia diputuskan bahawa perayu tidak pernah bersetuju untuk memasukkan pertikaian yang dipersoalkan tersebut untuk timbang tara. Atas rayuan kepada hakim dalam kamar, keputusan timbalan pendaftar kanan yang bijaksana diakaskan. Hakim mendapati bahawa terdapat perjanjian subkontrak di antara pihak-pihak dan bahawa terdapat penerimaan dalam perjanjian subkontrak di bawah klausa 10, untuk merujuk pertikaian kepada timbang tara walaupun perayu tidak menandatangani perjanjian subkontrak tersebut. Dapatan ini adalah berdasarkan atas 'conduct of the appellant in bidding for and proceeding with the works' dan bahawa tandatangan semata-mata keformalan.

Tidak puas hati dengan keputusan hakim yang bijaksana, perayu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tidak terdapat perjanjian timbang tara secara bertulis di antara pihak-pihak. Jika tidak terdapat perjanjian timbang tara, persoalan penangguhan prosiding sementara menunggu timbang tara di bawah s 10 Akta tidak berbangkit. Walau bagaimanapun, terdapat hubungan kontrak di antara pihak-pihak. Oleh itu, responden-responden tidak boleh kemudiannya mengenakan perjanjian lain ke atas perayu dengan mengatakan subkontrak bertulis yang rasmi kecuali perayu bersetuju untuk diikat oleh perjanjian bertulis responden-responden, yang mana ditolak oleh perayu (lihat perenggan 20–21 & 23).

(2) Mahkamah tidak dapat menerima hujahan responden-responden bahawa perayu telah menerima tetapi gagal untuk menandatangani perjanjian subkontrak yang dicadangkan tetapi meneruskan dengan menyiapkan kerja-kerja tersebut. Beban undang-undang untuk membuktikan tuntutan sedemikian atas imbangan kebarangkalian adalah ke atas responden-responden. Berdasarkan keterangan, beban undang-undang tidak dibuktikan oleh responden-responden apabila mereka membuat permohonan mereka. Perayu tidak menandatangani juga tidak memberikan respons kepada draf perjanjian subkontrak yang dihantar oleh responden-responden. Tidak terdapat pertukaran surat-surat atau faks atau cara berkomunikasi lain di antara pihak-pihak yang menunjukkan rekod perjanjian timbang tara bertulis. Surat-surat yang dirujuk oleh peguam responden-responden tidak relevan dan tidak mencukupi untuk membuktikan aras imbangan kebarangkalian pertukaran surat-surat yang menunjukkan rekod perjanjian timbang tara. Standard pembuktian tidak dicapai (lihat perenggan 24–25 & 30).]

Notes

For cases on grant of stay of proceedings, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1810–1811.

Cases referred to

Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor [2008] 3 MLJ 564, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 9, 9(3), 9(4)(b), 10

Appeal from: Civil Suit No S6–22–1126 of 2008 (High Court, Kuala Lumpur)

S Ashok (Vijaylatha Vellupillai with him) (YH Teh & Vellupillai & Associates) for the appellant.
Gideon Tan (Brian Cummings with him) (Gideon Tan Razali Zaini) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 24 March 2010. The appellant, Duta Wajar Sdn Bhd was the plaintiff at the High Court. The respondents, namely:

(a) Pasukhas Construction Sdn Bhd; and

(b) I-Innovations Construction Sdn Bhd were the defendants.

[2] On 24 March 2010 the learned judge of the High Court of Kuala Lumpur, on appeal to the judge in chambers, had allowed the respondents'/defendants' appeal against the decision of the learned senior assistant registrar.

[3] The learned senior assistant registrar, earlier, on 4 June 2009, had dismissed the respondents' (the defendants) application to stay all proceedings in the action pursuant to s 10 of the Arbitration Act 2005 ('the Act'). The learned senior assistant registrar made a finding that the plaintiff had never agreed to submit the dispute in question to arbitration. She based her finding on the fact that the plaintiff had not signed the document containing the alleged agreement relied upon by the defendants.

[4] Section 10 of the Act provides:

10 Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought,

arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[5] In allowing the appeal, the learned High Court judge was of the view that there was a subcontract agreement subsisting between the parties. The learned High Court judge made a finding that there was acceptance of the provision, ie cl 10 of the subcontract agreement, to refer the dispute to arbitration, although the plaintiff did not sign the subcontract agreement. The learned High Court judge based his finding of acceptance on the 'conduct of the plaintiff in bidding for and proceeding with the works'. To the learned judge, signing the subcontract agreement was a mere formality, citing *Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor* [2008] 3 MLJ 564.

[6] The plaintiff is aggrieved by the decision of the learned High Court judge in allowing the defendants' appeal to the judge in chambers; and hence the plaintiffs appeal to this court.

[7] On 6 July 2011 we unanimously allowed the plaintiff's appeal with costs.

[8] We now give our grounds.

[9] We are of the view that there is no arbitration agreement in writing existing between the parties as required by s 9(3) of the Act. Subsection (3) of s 9 of the Act stipulates:

> 9 Definition and form of arbitration agreement
>
> …
>
> (3) An arbitration agreement shall be in writing.

[10] By reason of the above provision, it is imperative that an arbitration agreement, if at all there is any, be in writing.

[11] In the present case, is there evidence that the arbitration agreement (if at all there is any) is in writing? In our judgment, we do not think so.

[12] The defendants were awarded a construction project in Cherating, Pahang, by a company known as MTM Millennium Holdings Sdn Bhd ('the employer').

[13] The defendants invited the plaintiff to tender their quotation for piling works at the project site. The plaintiff accepted the invitation. Subsequently, the plaintiff and the defendants entered into a subcontract agreement for the supply and installation of piles at the construction site.

[14] The defendants allege that this subcontract is in writing and this agreement (ie the subcontract) is entered into by the parties on or around 16 October 2007 (see para 5 of the defendants' affidavit in support of their application for stay). The plaintiff, however, takes the position that this subcontract is not in writing and was not made on or around 16 October 2007. It was made in August 2007, but prior to 27 August 2007.

[15] Be that as it may, it is contended by the defendants that cl 10.1 of the alleged (subcontract) agreement provides that any dispute, controversy or claim arising out of or relating to the alleged (subcontract) agreement shall be settled by arbitration.

[16] The plaintiff commenced work under the subcontract on 27 August 2007 on the instructions of the defendants, and completed the work on 15 November 2007. The plaintiff had made three progress claims, and they are on 26 September 2007, on 26 October 2007 and on 19 November 2007, all in all amounting to RM1,433,500.10; but the defendants failed to make any payment. Therefore the plaintiff filed a suit against the defendants on 15 December 2008 to claim the sum.

[17] However, on 12 February 2009, by way of summons in chambers, the defendants made an application to stay proceedings pursuant to s 10 of the Act.

[18] The draft (subcontract) agreement (containing the arbitration clause — cl 10) was sent to the plaintiff by the defendants on 16 October 2007 and received by the plaintiff on 17 October 2007; but the plaintiff refused to sign the agreement as it disagreed with the terms of the proposed subcontract.

[19] The defendants dispute the plaintiff's claim (made via the three progress claims) and seek to refer the dispute to arbitration pursuant to the said cl 10.1 of the alleged subcontract agreement. The said clause provides:

(10) APPLICABLE LAW AND ARBITRATION

10.1 Any dispute, controversy or claim arising out of or relating to this sub-contract, or the breach, termination or invalidity thereof, shall

A

be settled by arbitration in accordance with the provisions of the Arbitration Act 1952 [revised 1972] or any statutory modification or re-enactment

10.2 Governing law to be Malaysian laws.

B

[20] It is not disputed that the alleged subcontract document relied upon by the defendants remains unsigned throughout, and that the plaintiff had never informed the defendants whether it was agreeable or otherwise to the terms of the proposed subcontract agreement.

C

[21] On the facts, we are of the view that there is no arbitration agreement in writing existing between the parties. If there is no arbitration agreement in writing in existence between the parties, then the question of a stay of proceedings pending arbitration under s 10 of the Act does not arise.

D

[22] However, this does not mean that there is no contractual relationship between the parties. On the evidence, there is. Significantly, this contractual relationship existed even before 27 August 2007. But there is no evidence that this subcontract is in writing. It is pursuant to this subcontract that the plaintiff commenced work on 27 August 2007; and thereafter submitted its progressive claims to the defendants.

E

F

[23] Since there is already in existence a contract (ie a subcontract) between the parties, the defendants cannot later impose another agreement on the plaintiff said to be a formal written subcontract and to have been entered into (or deemed to have been entered into) on 16 October 2007 by the parties — unless, of course, the plaintiff agrees to be bound by this latter written agreement. But the plaintiff had declined to be a party to this second contract because it disagreed with the terms. It had refused to sign it.

G

[24] Mr Gideon Tan, learned counsel for the defendants, although conceding that the alleged subcontract agreement has remained unsigned, nevertheless, contends that there is an arbitration agreement in writing between the parties. In support of his contention, learned counsel for the defendants refers to s 9(4)(b) of the Act that states:

H

(4) An arbitration agreement is in writing where it is contained in —

I

(a) …

(a) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement.

[25] The legal burden is on the defendants to satisfy the court on a balance of probabilities that there were exchanges of letters or faxes or other means of communication that provide a record of an arbitration agreement between the plaintiff and the defendants on or around 16 October 2007. In the present case, has this legal burden been discharged by the defendants when they made their application? A B

[26] On the evidence adduced, we do not think so. The existence of an arbitration agreement in writing must be clearly established, particularly, where the party intending to establish that fact is relying on circumstantial evidence, as in the case here. The evidence must be clear. We do not think that the standard of proof has been met in the present case. C

[27] Mr Gideon Tan submits that the requirement of s 9(4)(b) has been satisfied as there are 'written communications exchanged between the parties'. Mr Gideon Tan refers to the 'INVITATION TO QUOTE' letter received by the plaintiff from the defendants on 1 August 2007 containing a paragraph stating: D

3 Form/Basis of Sub-Contract Agreement E

The agreement shall be in compliance with our main contract agreement with the client. You are to satisfy yourself as to the said agreement before submitting your quotation.

[28] Mr Gideon Tan also refers to the 'LETTTER OF ACCEPTANCE' dated 7 August 2007 written by the employer (MTM MILLENNIUM HOLDINGS) to the defendants. In sub-para (1) of the first paragraph of the letter it is stated: F

(1) You will be required to execute in due course a formal Contract Agreement. However, until the formal Contract Agreement is executed your Tender together with this Letter of Acceptance shall constitute a binding contract between your good selves and MTM MILLENIUM HOLDINGS SDN BHD. G

[29] Mr Gideon Tan refers to the fact that the appellant/plaintiff had admitted to receiving the proposed subcontract agreement from the defendants but had failed to sign and to return the same to the defendants; and instead the plaintiff proceeded to complete the work. Thus (so the defendants argue) there was acceptance of the terms of the written subcontract agreement by conduct on the part of the plaintiff. H I

[30] With respect, we are unable to accept such an argument.

[31] In our judgment, in the present case, as the plaintiff had neither signed nor responded to the draft subcontract agreement sent to it by the defendants, there is, therefore, no exchange of letters or faxes or other means of communication between the parties that provides a record of a written arbitration agreement. The mere fact that the plaintiff did not respond but proceeded to complete the work has no bearing on the issue as to whether or not the requirement of limb (b) of sub-s (4) of s 9 was satisfied. It is a pertinent fact to note that the proposed draft subcontract was sent at a late stage to the plaintiff. It was sent only in mid–October 2007 when the plaintiff had already commenced work on 27 August 2007 and had already submitted its first progress claim on 26 September 2007. On the facts, it can never be acceptance of the written subcontract by conduct by the plaintiff by the mere fact of the failure to respond on the plaintiff's part. But the crucial question is: were there exchanges of letters or faxes or other means of communications between the plaintiff and the defendants that can be said to provide a record of a written arbitration agreement? Clearly the answer is in the negative. The letters referred to by the Mr Gideon Tan are, in our view, irrelevant or insufficient evidence to prove on a balance of probabilities the exchanges of letters etc that provides a record of a written arbitration agreement. The 'INVITATION TO QUOTE' letter received by the plaintiff from the defendants on 1 AUGUST 2007 does not contain any arbitration clause. It merely refers to 'our main contract agreement with client. But the main contract (if ever there was any) is never exhibited. In fact, when the 'INVITATION TO QUOTE' letter was sent to the plaintiff, the defendants were yet to receive the LETTER OF ACCEPTANCE dated 7 August 2007 from the employer. The plaintiff is not a party to the 'LETTER OF ACCEPTANCE' letter. Both the defendants' 'INVITATION TO QUOTE' letter and the employer's 'LETTER OF ACEPTANCE' letter mention about a 'main contract agreement (or 'formal Contract Agreement). But we note that the defendants' affidavits are silent as to whether this main contract agreement was ever executed between the defendants and the employer; whether this main contract agreement ever contain an arbitration clause similar to cl 10.1 of the alleged subcontract. In any event, it is significant to note that this main contract agreement, including the alleged arbitration clause in it, was never exhibited by the defendants.

[32] Appeal allowed with costs of RM10,000; order of the High Court set aside; order of the senior assistant registrar restored.

Appeal allowed with costs.

Reported by Ibnu Aswan